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No. 93-1784

In The

Supreme Court of the United States

October Term, 1993

JOHN PATTERSON, *et al.*,

Petitioners,

vs.

NEWSPAPER AND MAIL DELIVERERS UNION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE NEW YORK TIMES COMPANY

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's application of the standard for terminating consent decrees set forth in *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991), and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. __, 116 L. Ed. 2d 867 (1992), to this case involving private, non-governmental defendants?

2. Did the Court of Appeals err in affirming the District Court's termination of this Consent Decree?

RULE 29.1 DISCLOSURE

The New York Times Company has no parent company. It owns interests in the following companies: International Herald Tribune U.S. Inc.; Donohue Malbaie, Inc.; Gaspesia Pulp and Paper Company, Ltd.; and Madison Paper Industries.

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The New York Times Company, one of the Respondents herein, respectfully requests that this Court deny the instant petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered December 20, 1993.

STATEMENT OF THE CASE

The Statements of Petitioners and the Equal Employment Opportunity Commission are, in large part, satisfactory. However, Petitioners' presentation of certain aspects of the case, coupled with certain omissions, necessitates the following observations:

1. The Consent Decree entered by the District Court herein expressly recognized that Respondents did not admit or concede liability under Title VII of the Civil Rights Act and that there was no finding of discrimination against them. The parties agreed that there was merely a statistical underrepresentation of minorities in the delivery departments of the employers and the membership of the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU"). The singular purpose of the Consent Decree, by its clear and express terms, was to "correct" this statistical imbalance and "put minority individuals in the position they would have occupied had the aforesaid statistical imbalance not existed".

Petitioners' failure to acknowledge, let alone present in their Petition, the controlling text of this Consent Decree speaks volumes about their repeated refrain that the Consent Decree was entered because of pervasive discrimination and can only be vacated when discrimination within the newspaper delivery industry has been eliminated. The purpose of the Consent Decree is set forth in its "Whereas" clause, which reads in full as follows:

> WHEREAS, the parties to these actions have agreed to the entry, upon this Court's approval, of a final Order adopting the provisions of this Settlement Agreement (hereinafter referred to as the "Order"), *without admission by any defendant of a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981, and without any finding by this*

Court that any defendant has discriminated against any person or persons because of race, color or national origin;

WHEREAS, there is, and has been at all times relevant herein, a *statistical imbalance of minority individuals* (i.e., all those persons defined by the Equal Employment Opportunity Commission as Black, Spanish-surnamed, Oriental and American-Indian), employed in the delivery departments of the defendant employers within the bargaining units represented by defendant NMDU and a *corresponding statistical imbalance* of NMDU members;

WHEREAS, the *relief provided by this Settlement Agreement is designed to correct the aforesaid statistical imbalance, to remedy and eradicate its effects, and to put minority individuals in the positions they would have occupied had the aforesaid statistical imbalance not existed.*

(JA 56-57) (emphasis added).[1] The Consent Decree established a goal of 25% minority employment within the industry (JA 60-61: ¶ 7).[2] This goal was not "an inflexible quota, but an objective to be achieved by the mobilization of available personnel and resources

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1. Record citations are to the Joint Appendix filed below ("JA __") or the original record ("R __").

2. The 25% target covered regular situation and Group I positions. Implementation ratios designed to achieve the 25% goal provided that minorities be placed in 60% of all Group III positions and 50% of all Group I positions.

of the defendants ... in a good faith effort to maximize employment opportunities for minorities. . . ." (JA 61: ¶ 8).

2. Petitioners misstate the substance of certain prior proceedings, obfuscating the fact that attainment of the 25% target has long been recognized as the dominant purpose of this Consent Decree.

a. In approving the goal of 25% minority employment, neither Judge Pierce nor the Second Circuit held, as Petitioners state (Petition for Writ at 11), that because this target was time frame-specific it had to be modified if not achieved by June 1979. The pages cited from the District Court and Second Circuit decisions make clear that all that was decided was that June 1979 was the target date for attainment of the 25% goal and that the contemporaneous 1970 census data supported the 25% goal (App. 28a-29a, 44a). Nowhere in the Consent Decree nor the District Court or Second Circuit decisions is there an indication that the parties intended for the goal to vary based on changing labor market composition.

b. In denying a 1979 application to modify the Consent Decree by eliminating the role of the Administrator, Judge Pierce did not, as Petitioners state (Petition for Writ at 5), rely on the continued existence of claims of discrimination. The sole basis for Judge Pierce's decision was the statistical position of the industry in relation to the 25% goal (App. 60a). The pendency of ten to fifteen matters before the Administrator (App. 58a), though mentioned by the court in stating the context for the motion, was not offered as a reason for denying the application.

c. In November 1988, Judge Conner suspended the 3:2 and 1:1 minority/non-minority implementation ratios for placement on the Group III and I lists, respectively, because of their "direct impact on the minority employment goal", which had

reached 27.61% (JA 314). Petitioners' present position that no modification of the Consent Decree is appropriate since minorities are underrepresented (Petition for Writ at 16, 21 n. 11) and discrimination continues dictates that Petitioners should have protested suspension of the implementation ratios. Yet, Petitioners did not request reconsideration of the Order so holding nor move under 28 U.S.C. § 1292(b) for certification of this ruling for a possible interlocutory appeal, and Petitioners continued under the Consent Decree without the implementation ratios for almost four full years thereafter.

3. Petitioners' assertion (Petition for Writ at 16 n. 8) that Judge Conner accepted "as accurate" their assertion that minority representation in the labor force had increased to 42.4% in 1980 and more than 50% in 1990 is misleading. In 1987, without any evidence having been adduced, the District Judge responded to Petitioners' representation concerning the 1980 figure by stating "I will accept that as established" because "I don't think its really relevant" (JA 265). Moreover, The New York Times entered into the record a 1987 labor market study that concludes that minority representation in the labor force remained between 25% and 30% (JA 285-87, 292-96, 298), though like Petitioners' analysis that study was never formally addressed by the District Court because of its relevance ruling.

4. Petitioners fail to support their contention of pervasive continuing discrimination, particularly after the filing of Respondents' motions to vacate the Consent Decree. Over the Consent Decree's 18 years, tens of thousands of significant employment decisions were made relating to initial hire, placement on the lists, bidding for jobs, termination, and the like in a delivery industry employing several thousand workers. That there were 278 claims over the Consent Decree's life means that, on average, there were just 15 claims each year. As many as 92 of the approximately 170 claims heard between 1979 and 1992

involved applications by employees to transfer from one enterprise to another. Approximately another 37 claims involved other matters also not relating to discrimination. (JA 162-74, 234-37) The bare handful of instances of supposed discrimination to which Petitioners can point that were adjudicated by the Administrator after the filing of the motions involved fewer than 35 claimed "discriminatees" (App. 72a, 82a; JA 696).[3]

Finally, Petitioners cannot properly refer to the 29 affidavits and declarations submitted in 1991 as part of an offer of proof (Petition for Writ at 15) and several more affidavits submitted in 1992 as part of their motion to reinstate the Consent Decree

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3. The claim involving The New York Times Company and NMDU, which has been denominated Claim 186, is ongoing and may be appealed to the Second Circuit upon conclusion of its remedy proceeding. The claim arose at a time when employment of minorities in The New York Times delivery department exceeded the 25% target; the remainder of the industry was nearing the 25% target; this Court had issued its decision in *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984), just one year earlier and the spate of subsequent affirmative action decisions of this Court that confined *Stotts* had not yet issued; and there was considerable uncertainty regarding the parties' legal rights since Respondents' motions to vacate or modify the Consent Decree were pending before the District Court and undecided (JA 336-58, 498, 261, 273-76). Moreover, during the appeal on the merits to the District Court, The Times sided with Petitioners and defended the revised hiring list the Administrator had ordered from challenge by the NMDU (772 F. Supp. at 837 n. 6 [App. 82a n. 6 is incomplete]; JA 336-37, 353-57, 380, 386). Finally, Petitioners misstate the facts in asserting that one-half of 47 regular situation positions were filled by minority members "[a]s a result of the Administrator's subsequent orders" in this claim. The District Court stayed (and effectively nullified) an Order of the Administrator that would have compelled such a result in November 1991 after The New York Times, by motion, demonstrated that the 47 employees on the hiring list The Times and Petitioners had defended jointly would be elevated in time as required given their list position but that was necessary to prevent a stay the Administrator's Order from interfering with delicate collective bargaining negotiations (R., Document 249).

pending appeal (Petition for Writ at 17) as evidence of discrimination. In 1986, the District Court had instructed Petitioners to present all claims of alleged discrimination to the Administrator (App. 66a; *see also* App. 115a, 120a n. 16). The District Court held that Petitioners' knowing failure to avail themselves of that opportunity over a period of 5 years foreclosed these affidavits and declarations from being accorded any evidentiary significance (App. 120a n. 16). Accordingly, Respondents have never addressed the merits of these allegations, and they are no more than mere assertion at this point in the proceeding.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANOTHER COURT OF APPEALS, NOR DOES IT PRESENT A QUESTION THAT THIS COURT NEEDS TO DECIDE.

Petitioners assert that this case presents two important questions: first, whether *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. __, 116 L. Ed. 2d 867 (1992), overruled *sub silentio United States v. Swift & Co.*, 286 U.S. 106 (1932); and, second, whether the "flexible" modification standard *Rufo* endorses applies in cases like this one involving non-governmental defendants? The answer to the first question is that *Rufo* did not overrule *Swift* and *Swift* remains good law, as the Second Circuit noted (App. 8a), in a narrow category of cases. The answer to the second question is, as the Second Circuit held (App. 8a-10a), that more fundamental principles than whether a defendant is a governmental entity determine whether the "flexible" modification standard applies in a given case.

In *Rufo*, 116 L. Ed. 2d at 883-84, this Court rejected Petitioners' contention that it overruled *Swift* by explaining that it had long indicated that it was not appropriate to read *Swift* as foreclosing the vacation or modification of consent decrees in virtually all cases: "Our decisions since *Swift* reinforce the conclusion that the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees". This Court's decision in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 112 L. Ed. 2d 715, 727-28 (1991), was to the same effect, and *Rufo* and *Dowell* represent nothing more than the reaffirmation of this Court's flexible approach to consent decree modification in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

United Shoe indicated that the "grievous wrong" standard of *Swift* was highly fact-dependent, 391 U.S. at 248, a conclusion echoed and enlarged upon in *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 968-69 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983). There, the Second Circuit foreshadowed its decision here by pointing out that the "grievous wrong" standard is applicable when the interests accommodated by a consent decree are relatively constant and the protections provided by the consent decree remain necessary. 706 F.2d at 969-71. *Swift* itself states:

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.... The distinction is between restraints that give protection to *rights fully accrued upon facts so nearly permanent as to be substantially impervious to change*, and those that involve the *supervision of changing conduct or conditions and are thus provisional and tentative.*

286 U.S. at 114 (emphasis added). Where, on the other hand, "institutional reform" is implicated because that which the consent decree regulates is multi-faceted and changing and there is a shifting mix of interests, including those of non-parties, a more flexible approach is ordinarily necessitated.

The instant case fits the *Carey* formulation for application of the "flexible" standard. As the District Court pointed out (App. 109a), and the Second Circuit affirmed (App. 9a), this Consent Decree affects a myriad of individuals who were not members of the plaintiff class when the case commenced. In 1991, in a case denominated Claim 230, the District Court tellingly made this point:

> Only five of the forty-two paragraphs in the Settlement Agreement relate solely to the members of the original private class. Paragraph 9 required specific employment action, long ago implemented, with respect to some of the named plaintiffs in the private action. Paragraphs 36, 37, and 38 provide for one-time monetary payments relating to members of the private class. These were paid long ago. Paragraph 39 defines the private class, and identifies Appendix B as a listing of the thirty-six individuals who were known by defendants at the time of execution of the Settlement Agreement to be members of the private class. All of the other paragraphs of the Settlement Agreement regulate the employment practices of the defendants with respect to any minority individual, and not just private class members.

Patterson v. NMDU, 760 F. Supp. 1087, 1093 (S.D.N.Y. 1991).

Additionally, employment opportunities of non-minority individuals are directly affected by several components of the Consent Decree, such as the 3:2 and 1:1 minority/non-minority implementation ratios that make placement upon and advancement up the hiring lists dependent upon race. *A fortiori*, it was hardly a giant leap for the courts below to conclude that this Consent Decree was a case of institutional reform though the regulated enterprises were in the private sector.

This Court's decisions make clear that the "flexible" modification standard is appropriately applied in private sector settings. *United Shoe*, like the instant case, involved a governmental plaintiff and private sector defendants. *Railway Employees v. Wright*, 364 U.S. 642, 647-48 (1961), also was a private institution case in which a flexible approach was applied. *Rufo* cited both these precedents, making clear that applicability of the "flexible " modification standard is dependent not at all upon whether the defendant is public or private sector but, rather, the nature of the rights involved and the extent to which others than those who are party to the litigation are affected. The problem this Court addressed was the modification of consent decrees in institutional reform settings and, quoting *Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989), this Court broadly defined such situations as those that "reach beyond the parties involved directly in the suit. . . . " 116 L. Ed. 2d at 885.[4]

With this said, it is apparent that the application of *Rufo* to the instant case was doctrinally sound and anything but unexpected. Even if, as the Second Circuit concluded, this was the first case to explicitly adopt *Rufo* in a private sector setting, it does not present

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4. In *Heath*, the Sixth Circuit Court of Appeals suggested that the *Swift* standard should be confined to commercial consent decrees that involve only the parties to the subsisting litigation. 888 F.2d at 110.

a novel or important issue or an unanticipated development warranting this Court's review.

II.

THE DISTRICT COURT AND COURT OF APPEALS PROPERLY CONCLUDED THAT RESPONDENTS COMPLIED WITH THE CONSENT DECREE, ACHIEVING ITS PURPOSE.

Petitioners assert that the Second Circuit erred in affirming the District Court's dissolution of the Consent Decree without considering the evidence they presented of pervasive and continuing discrimination. Petitioners' argument is factually and legally incorrect.

As indicated in the Statement of the Case, there is no evidence of pervasive, continuing discrimination. The record discloses a mere four adjudications involving fewer than 35 claimed discriminatees in the 7 years following filing of the motions to vacate. In view of the fact thousands of employment decisions are made annually by approximately 20 covered employers, the substantially discrimination-free experience of Respondents is an impressive one. Respondents argued successfully to the lower courts that the time has come for them to operate like the remainder of American industry and demonstrate that they are capable of remaining discrimination-free without the oversight of a costly consent decree apparatus. If Respondents are unable to do so, Petitioners have recourse under the panoply of federal, state, and local anti-discrimination laws (App. 12a, 115a-116a and 120a n.16, 121a, 131a).

Assuming *arguendo*, as did the District Court that substantial discrimination continues (App. 114a), vacation of the Consent Decree was appropriate nonetheless. The principal and overriding

purpose of this Consent Decree was to eliminate minorities' statistical underrepresentation. The target to which the parties agreed was 25%, not an indefinite number that fluctuated with supposedly changing minority representation in the labor market. *Cf. Youngblood v. Dalzell*, 925 F.2d 954, 956 (6th Cir. 1991). The 25% target was achieved and exceeded in the face of an industry recession and a substantial contraction of newspaper delivery jobs (JA 329-35, 360). Moreover, Petitioners did not and could not contest The New York Times's demonstration of a "carryover effect" (resulting from the great predominance of minorities toward the middle and bottom of regular situation and Group I lists) that will further elevate the percentage of minorities within the industry over time (App. 110a n.10).

The Second Circuit correctly observed that the District Court did not hold that it was required to vacate the Consent Decree under the instant circumstances. The District Court held no more than that it was entitled to do so given its considerable experience with the parties (App. 11a-12a, 113a-114a).[5] As such, the lower court decisions are of little precedential value. No court properly can conclude from these decisions that certain circumstances compel the vacation of another consent decree. Moreover, as EEOC recognizes (EEOC Opposition Brief at 9), this case is enormously fact-specific inasmuch as the lower courts decided that the dominant purpose of this Consent Decree was attainment of the

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5. This Court has emphasized the considerable deference that is to be accorded the judgments of a District Judge who has, as here, lived with a consent decree for over a decade. *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 216 (1947) (district court judge has a unique "feel of the case which no appellate printed transcript can impart", resulting "in a perspective peculiarly available to him alone"); *Railway Employees*, 364 U.S. at 648 (district judge must have "wide discretion" since "there is such a balance of imponderables"); *United States v. Paradise*, 480 U.S. 149, 184 (1987) ("firsthand experience with the parties" renders district judge "best qualified" to assess circumstances of case).

25% target. Any consent decree written more broadly to require other than the elimination of a specified statistical imbalance will fall outside the compass of this case.

For these reasons, this case does not present a substantial and important question warranting this Court's review.

III.

THE DECISION OF THE COURT BELOW WILL PROMOTE THE PUBLIC POLICY OF ENCOURAGING THE SETTLEMENT OF TITLE VII CASES.

Petitioners' contention that the public policy favoring settlement of Title VII cases will be undermined by this case (Petition for Writ at 22) misses the mark completely. The Second Circuit decision advances that policy.

In the ordinary case, defendant companies and labor unions would have no incentive to enter into consent decrees if the law provided that vacation of a consent decree was impossible until a non-discriminatory nirvana exists. Absent consent decree language *specifically* providing for a completely discrimination-free workplace, defendant companies and unions must know that substantial compliance with the obligations of a consent decree will entitle them to relief from its terms.

Plaintiffs will not be deterred from entering consent decrees under the "flexible" modification standard. They enter such settlements knowing that "substantial compliance" is the touchstone for modification and, depending upon the strength of each case, can negotiate terms conducive to that standard.

This analysis is consistent with that of the Second Circuit in this case (App. 10a). No matter how much Petitioners attempt a

revisionist outlook now, the Consent Decree they entered clearly established elimination of a specified statistical imbalance — not elimination of discrimination or even labor market parity — as the objective for attainment. This was not irrational under the circumstances since the evidence, credited by the District Court, was that the exclusion of minorities was the result not of racial animus but NMDU's nepotistic policy of favoring members' relatives (App. 21a). Petitioners' entire policy argument fails as a result of their refusal to acknowledge these realities. This is not to say that every consent decree flowing out of a disparate impact case only may establish as its purpose attainment of a predetermined statistical target. Rather, that is what these parties did at a very early stage in the evolution of Title VII. The wide variety of settlements that are possible, coupled with subsequent recognition that more specific termination provisions than that used here are imperative, underscores that this case is unique and not of great moment.

The parade of horribles about which Petitioners warn is also imaginary. Despite Respondents' supposed "intransigence" (Petition for Writ at 24), Petitioners failed to avail themselves of the ample opportunity the District Court accorded them to present a supposed legion of discriminatory acts to the Administrator for adjudication to prove Respondents' recidivism. The District Court had instructed Petitioners to follow this course in 1986. The Consent Decree was not dissolved until 1992. The District Court hardly vacated the Consent Decree precipitously. Indeed, it seems manifest from the District Court's careful consideration of *Swift* that had Petitioners adduced evidence of pervasive, continuing discrimination by actually adjudicating the numerous cases they maintained they could prove, the District Court would have entertained the argument that the "dangers, once substantial," of minority representation falling below the 25% target had not "become attenuated to a shadow" (App. 98a, 107a). Petitioners denied themselves their sole opportunity to analogize this situation

to *Swift* by failing to follow the District Court's instruction as to how they could create such a factual record.

A fortiori, this case is not the seed from which the lower courts will be overrun by Title VII litigation. The prudence with which the District Court conducted itself in relieving Respondents of this particular Consent Decree, *sui generis* as it is, makes clear that allowing this decision to stand will not defeat the public policy favoring settlement of Title VII cases. To the contrary, the lower courts' pragmatic and common sense approach advances this policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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